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I. INTRODUCTION

Recent developments in biomedical technology necessitate a re-examination of the legal attitude toward property rights in corpses and body parts.[1] Some medical researchers in Canada,[2] Australia[3] and England[4] stand accused of harvesting organs and body parts from cadavers without the consent of living relatives. For example, a husband, alleging a property right in the corpse of his wife, brought an action against a research foundation for removing her brain tissues.[5] In another incident, Ashkenazi Jews collaborated with researchers investigating Canavan's disease by providing their bodily tissues and pedigree information.[6] When the research results were subsequently patented, however, the

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1. *See* Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 228 (1986).

2. Charlie Gillis, *Doctor Left Autopsies Unfinished in Halifax: Children's Organs Found in Warehouse*, NAT'L POST (Can.), Oct. 3, 2000, at A8.

3. Michael Perry, *'Body-parts Supermarket' Causes Uproar in Australia: No Consent for Research*, NAT'L POST (Can.), Mar. 20, 2001, at A13.

4. Stephen White, *The Law Relating to Dealing with Dead Bodies*, 4 MED. L. INT'L 145, 145-46 (2000).

5. *See* Paul Waldie, *Husband Sues After Brain Tissue Taken from Dead Wife*, NAT'L POST (Can.), Jan. 29, 2000, at A13.

6. *See generally* Peter Gorner, *Parents Suing Over Patenting of Genetic Test: They Say the Researchers They Assisted are Trying to Profit From a Test for a Rare Disease*, CHI. TRIB., Nov. 19, 2000, at A1.

research subjects complained that the patent was unfair and amounted to a conversion of property rights in their bodily tissue.[7] These allegations aggressively impugn the general proposition that there are no property interests in corpses.[8]

In contrast to the historic jurisprudence on dead bodies,[9] current legal philosophy favors recognizing property rights.[10] In 1992, Judge Cowen of the U.S. Court of Appeals observed, "human remains can have significant commercial value, even though they are not typically bought and sold like other goods. Although remains which are used for these medical and scientific purposes are usually donated, rather than bought and sold, this does not negate their potential commercial value."[11] Even the British Court of Appeals accepted that there are property interests in the human body.[12]

The non-market view of the human body and tissue, without its moral, philosophical and religious underpinnings, has been progressively challenged.[13] Advances in biomedical technology and research have brought the issues of property rights in human

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7. *Id.*

8. Bernard M. Dickens, *The Control of Living Body Materials*, 27 U. TORONTO L.J. 142, 143 (1977).

9. Paul Matthews, *Whose Body? People As Property*, 36 CURRENT LEGAL PROBS. 193 (1983). Paul Matthews argued that it is possible to consider a corpse as a physical object entitled to the characterization of property, thus affording protection of the law. *Id.* Dickens, however, in a discussion of the living body and its parts, suggested: "A better approach, therefore may be to consider the human source as having an inchoate right of property in materials issuing from his body." Dickens, *supra* note 8, at 183. Earlier, Dickens suggested that a property approach might have changed the outcome of cases like Mokry v. Univ. of Tex. Health Sci. Ctr. at Dallas, 592 S.W.2d 802 (1975) and Brooks v. S. Broward Hosp. Dist., 32 So. 2d 479 (1975). Dickens, *supra* note 8, at 149.

10. *See* Matthews, *supra* note 9, at 198.

11. Onyeanusi v. Pan Am, 952 F.2d 788, 792 (3d. Cir. 1992). This contrasts with the holding of Judge Stamp. He stated, "it would be a distortion of the English language to describe the living or the dead as goods or materials." Bourne v. Norwich Crematorium Ltd., All E.R. 576, 578 (1967) (Eng.). In the Court of Appeals decision in Moore v. Regents of the Univ. of Cal., Justice Rothman observed: "Until recently, the physical human body, as distinguished from the mental and spiritual, was believed to have little value, other than as a source of labor. In recent history, we have seen the human body assume astonishing aspects of value. . . . For better or worse, we have irretrievably entered an age that requires examination of our understanding of the legal rights and relationships in the human body and the human cell." Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 504 (Ct. App. 1988).

12. Dobson v. N. Tyneside Health Auth., 1 W.L.R. 596, 601 (C.A. 1997).

13. *See* Margaret Somerville, *The President, the Prime Minister, the Pope and the Embryo*, NAT'L POST (Can.), Sept. 21, 2000, at A18 (commenting on the therapeutic and commercial usage of the human embryo and its corollary ethical question).

bodies and tissues to the forefront.[14] These issues are important to biomedical researchers, as well as society in general.

Governmental agencies have also expressed concerns about how laws creating a property interest in dead human bodies and tissue will impact biomedical research.[15] For instance, the U.S. Office of Technology Assessment observed:

> The assertion of rights by sources would affect not only the researcher who obtained the original specimen, but perhaps other researchers as well. Biological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories....Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists.[16]

This article explores the laws on dead bodies and body parts in historical, modern and comparative contexts. In addition, it examines how these laws accord with current scientific and economic realities. The second section deconstructs the traditional concepts of property and assesses the suitability of their application to human corpses and body parts. The final section argues that there should be a property interest in human corpses and tissue.

II. HISTORICAL BACKGROUND ON THE NO-PROPERTY RULE IN DEAD BODIES

A historical sketch of the no-property rule in dead bodies is necessary to appreciate the recent changes in case law on the subject and the various suggestions outlined in this article.

A. United Kingdom

Before the early nineteenth century, British common law

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14. *See* J.G. Castel, *Legal Implications of Biomedical Science and Technology in the Twenty-First Century*, 51 CAN. B. REV. 119 (1973).

15. Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr.494, 508 (Ct.App. 1988).

16. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 493-94 (Cal. 1990) (citation omitted).

recognized a property interest in dead bodies.[17] Old British cases held that a creditor may arrest the body of a deceased debtor for debts owed.[18] Implementation of the arrest was sufficient consideration for a contract.[19] These cases demonstrate that the British regarded a corpse as property. However, in *Jones v. Ashburnham*,[20] the court condemned the practice as being "contrary to every principle of law and moral feeling."[21] By the mid-nineteenth century, it was reasonably settled that a dead body was not property that could be arrested in execution of a debt or judgment.[22] Consequently, in *R v. Fox*,[23] the court issued a mandatory injunction against a correctional officer compelling the release of a prisoner's corpse detained for an alleged debt.[24]

While the subsequent no-property rule in dead bodies cannot be traced with clarity, certain points are clear. The establishment of Christianity in Britain favored burial in consecrated grounds rather than in caves or city outskirts.[25] Ecclesiastical courts assumed complete jurisdiction over dead bodies and applied canon law, or religious law, as the substantive law.[26] As a result, the common law, formed in non-ecclesiastical courts, did not have the opportunity to develop comprehensive rules on dead bodies.[27]

The common law, however, offered some criminal law protection for buried and even unburied bodies in unconsecrated grounds. Under the common law, it was a misdemeanor to exhume a dead body, even for honorable reasons, without the authority of a court.[28] It was also a misdemeanor to prevent the burial of a corpse.[29] For that purpose, the common law recognized a duty for

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17. Quick v. Coppleton, 83 Eng. Rep. 349 (K.B. 1803); R. v. Cheere, 107 Eng. Rep. 1294 (K.B. 1825).

18. *Cheere*, 107 Eng. Rep. at 1297.

19. *Quick*, 83 Eng. Rep. at 349.

20. Jones v. Ashburnham, 102 Eng. Rep. 905 (K.B. 1804).

21. *Id.* at 909.

22. R. v. Francis Scott, 114 Eng. Rep. 97 (K.B. 1842).

23. R. v. Fox, 114 Eng. Rep. 95 (Q.B. 1841).

24. *Id.* at 96.

25. Andrews v. Cawthorne, 125 Eng. Rep. 1308 (C.P. 1744); Gilbert v. Buzzard, 161 Eng. Rep. 761, 762 (P. 1820).

26. *See generally id.*; Pierce v. Proprietors of Swan Point Cemetery, 14 Am. Rep. 667, 676 (1872).

27. Phillips v. Montreal Gen. Hosp., [1908] XIV La Revue Legale 159, 164.

28. R. v. Lynn, 100 Eng. Rep. 394, 394-95 (K.B. 1788); R. v. Sharpe, 169 Eng. Rep. 959, 959 (Cr. Cas. 1857).

29. R. v. Feist, 169 Eng. Rep. 1132, 1133 (Cr. Cas. 1858); R. v. Hunter 1 W.L.R. 95, 98 (C.A. 1974) (Eng.); Michael Hirst, *Preventing the Lawful Burial of a Body*, 1996 CRIM. L.

certain people, namely executors, administrators, occupiers of buildings and next of kin, to bury a deceased person.[30] Beyond this, the common law did not provide any civil remedy to the relatives of a deceased person for the indignities that might be inflicted upon a corpse.[31] The common law no-property rule in dead bodies is most clearly espoused by William Blackstone who said, "[t]hough the heir has a property interest in the monuments and escutcheons of his ancestors, he has none in their bodies or ashes; nor can he bring any civil action. . .against their bodies or ashes or violate their remains."[32]

Although Blackstone has been criticized for his etymological quibbling of the Latin word 'cadaver,'[33] his proposition articulated a rule that lasted nearly 200 years and settled many cases in the United Kingdom.[34] Recently, this has been diluted by exceptions introduced by the British courts in *Dobson v. North Tyneside Health Authority*[35] and *R. v. Kelly*.[36]

B. Canada

Though Canada, like most other common law countries, was politically dependent on the United Kingdom, it did not have state-established ecclesiastical courts.[37] This provided an opportunity to adopt a radical and different approach to the British law that was formulated in the context of an ecclesiastical jurisdiction.[38] The opportunity was not seized, however, as some court rulings in Canada remained faithful to the British no-property rule.[39] For example, in *Davidson v. Garrett*, the plaintiff brought an action for damages against some practicing physicians

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REV. 96, 99 (1996).

30. R. v. Stewart, 113 Eng. Rep. 1007 (K.B. 1840).

31. Williams v. Williams, 20 W.L.R. 659, 663-64 (Ch. D. 1882) (Eng.).

32. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 429 (U. of Chi. Press 1979).

33. R. F. Martin, Annotation, *Removal and Reinternment of Remains*, 21 A.L.R. 2d 472, 480 (1952).

34. *See* Williams v. Williams, 20 W.L.R. 659 (Ch. D. 1882) (Eng.); R. v. Sharpe 169 Eng. Rep. 959 (Cr. Cas. 1857); P.D.G. Skegg, *The "No Property" Rule and Rights Relating to Dead Bodies*, 5 TORT L. REV. 222, 229 (1997).

35. Dobson v. N. Tyneside Health Auth., 1 W.L.R. 596 (C.A. 1997) (Eng.).

36. R. v. Kelly, 3 All E. R. 741 (C.A. 1988) (Eng.).

37. *See* Phillips v. Montreal Gen. Hosp., [1908] La Revue Legale 159, 164. *See also* Miner v. C.P.R. [1911] Alta. L.R. 408, 413.

38. *Id.*

39. *See* Davidson v. Garrett [1899] C.C.C. 200, 203.

for conducting an unauthorized dissection on his deceased wife's body.[40] The defendants justified the act based on the authority of a post-mortem direction given orally by the coroner.[41] Though the case turned on the legality of the oral direction given by the coroner, the court nevertheless held that:

> [T]he cutting and mutilating of the dead body of the plaintiff's wife are alleged in aggravation of the damages which the plaintiff seeks to recover for the alleged trespass, probably because, according to the law of England as introduced into this Province, there is no property in a dead body, and a trespass cannot be committed in respect of it.[42]

1. Possession and Custody Rights

In 1930, in *Edmonds v. Armstrong Funeral Home*,[43] the Alberta Supreme Court accepted the British no-property rule with its narrow exception for possession and custody rights for burial.[44] In *Edmonds*, the undertaker, who was hired by the plaintiff to bury his wife, conspired with surgeons to harvest organs from the body of the corpse.[45] The court referred to the British decisions and upheld the no-property rule.[46] The court held, however, that the defendants' acts were an interference with the plaintiff's right of possession and custody in his deceased wife's body for burial.[47]

In contrast, Quebec adopted a contrary rule recognizing the existence of a property right in a dead body.[48] This emanates from the decision in *Phillips v. Montreal General Hospital*,[49] where a widow of the deceased claimed damages against the defendant for conducting an unauthorized autopsy on the deceased's body.[50] In *Phillips*, the British decisions were confined to their historical context and guidance was sought from the more revolutionary U.S.

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40. *Id.* at 202-03.
41. *Id.* at 203.
42. *Id.* at 202-03.
43. Edmonds v. Armstrong Funeral Home Ltd., [1931] D.L.R. 676.
44. *Id.* at 680.
45. *Id.* at 681.
46. *Id.* at 680.
47. *Id.*
48. *See Phillips*, [1908] XIV La Revue Legale at 165 (holding that widow had a cause of action against defendant who performed unauthorized autopsy on deceased husband's body).
49. *Id.*
50. *Id.* at 160.

cases on point.[51] The court observed that:

> [U]nder the civil law a person may, during his life, dispose of his remains in whole or part, so long as the disposition does not offend against public order or police regulations. Thus, he might will his body to a school of anatomy....In the absence of personal directions, the remains are the property of the family, just as is the body of an animal.[52]

2. Damages

A similar radical approach was taken in the Alberta case of *Miner v. C.P.R.*[53] The plaintiff brought an action for damages for mental distress arising from the defendant's negligence in delaying delivery of the corpse of plaintiff's son.[54] The defendant contracted to transport the corpse from British Columbia to Alberta.[55] The defendant argued that the plaintiff had no cause of action because there was no property interest in a corpse.[56] The trial judge extensively reviewed the old British authorities on point and concluded that they were based on weak precedent and juristic authority.[57] The court found the absence of ecclesiastical jurisdiction in Canada as further ground to depart from the British decisions.[58] Consequently, the court held "the law recognises [a] property [interest] in a corpse"[59] and, therefore, awarded both special and general damages to the plaintiff.[60] On appeal, however, the court addressed the issue of whether general damages for mental distress were permitted.[61] The court set aside the award of general damages for mental distress on the grounds that it was not accompanied by any physical harm.[62]

In *Mason v. Westside Cemeteries*,[63] an Ontario court held that damages were recoverable even in the absence of physical

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51. *Id.* at 161-164.
52. *Id.*
53. *Miner*, [1911] Alta. L.R. at 408.
54. *Id.*
55. *Id.* at 409.
56. *Id.*
57. *Id.* at 409-13.
58. *Id.* at 413.
59. *Id.* at 413-14.
60. *Id.* at 417.
61. *Id.* at 418.
62. *Id.* at 419-22. This distinction bedeviled U.S. jurisprudence for years. *Id.* at 419.
63. Mason v. Westside Cemeteries Ltd., [1996] D.L.R. 361.

harm.[64] In *Mason*, the defendant negligently lost urns containing cremated remains of the plaintiff's parents.[65] The plaintiff successfully claimed damages in both bailment and negligence, but only nominal damages were awarded.[66] This case provided useful insight into the court's treatment of the no-property rule. Though the court affirmed the general British rule that there was no property interest in a dead body,[67] the court found in favor of bailment. As the learned judge correctly stated,[68] bailment is a legal cause of action that seeks to redress the plaintiff's property rights in a thing in possession of a bailer.[69] Consequently, a bailment cause of action does not aid a plaintiff except when a property right is implicated.[70] In finding for the plaintiff on bailment, the judge paradoxically or implicitly accepted the existence of a property right in a corpse or human remains.[71]

As illustrated, while some Canadian courts remain faithful to the British no-property rule, it does not justify arguing that the Canadian decisions reflect an unwavering application of the British rule.

3. Criminal Statutes

Apart from the civil law protections given to a dead body, Canada has a well-defined criminal law provision intended to protect the dignity of a corpse.[72] Section 182 of the Canadian Criminal Code[73] states that:

> [e]very one who neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains, or improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether

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64. *See id.* at 380.
65. *See id.* at 364.
66. *Id.* at 382.
67. *Id.* at 368.
68. *Id.*
69. *Id.* at 369.
70. *See id.* at 367.
71. *Id.* "At first blush it may seem odd to apply the principles of bailment to a situation involving the burial of a dead person's remains in a cemetery. One does not normally think of a cemetery owner as being the bailee of all of the bodies buried in the cemetery. On reflection, however, I have come to the conclusion that there is a relationship of bailment created in these situations." *Id.* at 368.
72. Criminal Code [Crim. Code], R.S.C., ch. C-46, § 182 (1985) (Can.).
73. *Id.*

> buried or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.[74]

Although this Section does not literally or expressly refer to the prevention of burial, which is a misdemeanor under common law, the terms are broad enough to cover cases of preventing burial.[75] This linguistic construction is more apparent and compelling when the next-of-kin, who is entitled to the disposition of the corpse, prevents burial. In that case, it is a breach of duty under Section 182(a).[76] Problems of interpretation arise when a third party, who owes no duty to the corpse,[77] prevents burial.[78] Preventing the burial of a deceased person is an interference and indignity to a human corpse under Section 182(b).[79]

The Supreme Court of Canada in *R. v. Moyer*[80] interpreted Section 182(b).[81] The accused, a white supremacist and neo-Nazi, committed indignities to corpses buried in a Jewish cemetery.[82] This was done by taking photographs depicting a simulated urination on one of the gravestones and an exhibition of a male genital organ on another gravestone.[83] The accused argued that the standard under Section 182(b) was not met because the indignity resulted from a photographic depiction without physical interference with the buried corpses.[84]

The court dismissed the argument and held that physical interference, though a sufficient element of the offense, was not necessary for its commission.[85] The court also considered immaterial the fact that the indignity was offered to the gravestones marking the remains instead of the remains themselves.[86] The court did, however, emphasize that there must be human remains beneath the gravestone. Thus, if a gravestone

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74. *Id.* at 108-109.
75. *Id.* at 109. *See also* R. v. Hunter, 1 Law Reports 95, 98 (Q.B. 1974).
76. *Id.* at 108.
77. *See Hunter*, 1 Law Reports at 97 (Q.B. 1974) (discussing where the accused persons, as friends of the deceased and all under twenty years old, hid the deceased's body after she died in the course of horseplay).
78. *Id.*
79. Crim. Code, ch. C-34, § 182(b).
80. R. v. Moyer, [1994] S.C.R. 899.
81. *Id.* at 907-09.
82. *Id.* at 902.
83. *Id.* at 902-03.
84. *See id.* at 900.
85. *Id.* at 906-07.
86. *Id.*

was erected some distance from the human remains, any indignity toward such a gravestone would not be an offense under this section.[87]

C. United States of America

From the beginning, U.S. courts openly showed their aversion to the British no-property rule because of its conceivable injustice to a plaintiff whose dead relative's body was the object of abuse or desecration by a defendant.[88] Most U.S. courts have made advantageous use of their non-ecclesiastical history, which was traditionally used as a basis for rejection of the ecclesiastically-influenced British rule.[89] The U.S. courts of equity assumed jurisdiction over dead bodies and were prepared to grant relief.[90] Consequently, a probate court did not have jurisdiction to entertain an action on the interment and re-interment of a dead body because a corpse "forms no part of the estate"[91] of a deceased person.

In *Ritter v. Couch*,[92] the court made a forceful declaration representative of the U.S. judicial sentiment and aversion to the British rule:[93]

> The dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence.[94]

U.S. courts were challenged in finding a legal basis to grant a remedy.[95] Confusion, inconsistent approaches and legal fictions demonstrate the severity of this problem in numerous U.S. cases on the subject.[96] The best practicable and analytical approach is to

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87. *See id.* at 906-09.
88. *See generally* Martin, *supra* note 33, at 482.
89. *See* Martin, *supra* note 33, at 481.
90. *See* Martin, *supra* note 33, at 476; Home Undertaking Co. v. Joliff, 19 P.2d 654, 656 (1933); *See* Glatzer v. Dinerman, 59 A.2d 242, 243 (1948).
91. Fischer's Estate v. Fischer, 117 N.E.2d 855, 859 (1954).
92. Ritter v. Couch, 76 S.E. 428, 430 (W. Va. 1912).
93. *Id.* at 430.
94. *Id.*
95. *See generally id.* at 432-33.
96. *See* Michelle B. Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 220 (1990).

treat the various methods adopted by U.S. courts under some general categories.[97] For example, a remedy based on trespass to land presented no problem because it usually involved the desecration of the corpse of a plaintiff's relative, that was buried on land owned by the plaintiff or where the plaintiff had recognizable title.[98]

1. Claims Based in Tort

A widely used method relating to dead bodies were claims based in tort.[99] Tort claims, however, lacked consistency. This resulted in five distinct causes of action: intentional infliction of emotional distress,[100] intentional mishandling of a dead body,[101] abuse of a dead body,[102] negligent infliction of emotional or mental distress[103] and negligent or wrongful interference with a dead body.[104]

The first three causes of action are similar, requiring a plaintiff to prove outrageous, willful or wanton conduct by the defendant before liability can be attached.[105] The plaintiff is also required to show that he or she was the immediate focus of the defendant's outrageous conduct.[106] In other words, the plaintiff must be aware of the defendant's outrageous conduct.[107]

These requirements make these causes of action unattractive to a plaintiff. For example, some courts held the requirements were not met when the defendant's conduct was merely negligent,[108] where the alleged desecration was done in execution of public policy embodied in a statute[109] or where the defendant

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97. *See id.*

98. *See* Meagher v. Driscoll, 99 Mass. 281, 284-85 (1868); Thirkfield v. Mountain View Cemetery Ass'n, 41 P. 564, 565 (Utah 1895).

99. *See* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 386 (2000).

100. Jaynes v. Strong-Thorne Mortuary, Inc., 954 P.2d 45, 50 (N.M. 1997).

101. Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 879 (Colo. 1994).

102. Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430, 432 (Ohio 1986).

103. Janicki v. Hosp. of St. Raphael, 744 A.2d 963, 967 (Conn. Super. Ct. 1999); Wallin v. Univ. of Cincinnati Hosp., 698 N.E.2d 530, 531 (Ohio 1998); Green v. S. Transplant Serv., Inc., 698 So. 2d 699, 700 (La. 1997).

104. Ramirez v. Health Partners of S. Ariz., 972 P.2d 658, 665-66 (Ariz. 1998).

105. Christensen v. Super. Ct., 820 P.2d 181, 202 (Cal. 1991).

106. *Id.* at 202-03. This requirement is criticized by Justice Mosk. *Id.* at 204.

107. *Id.* at 203.

108. Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 883 (Colo. 1994).

109. *See Ramirez*, 972 P.2d at 658; Wallin v. Univ. of Cincinnati Hosp., 698 N.E. 530 (Ohio 1998).

atoned for his wrongdoing by pre-litigation compensation to the plaintiff.[110] As a result, a plaintiff, offended by the abuse of the dead body of a relative, was left without a remedy, even though a remedy was theoretically available in U.S. jurisprudence.[111]

Under negligent infliction of emotional distress, there is no comprehensive protection to a plaintiff.[112] To recover for this tort, some U.S. jurisdictions require that damages for emotional distress be accompanied by a contemporaneous physical or pecuniary loss.[113]

Because a plaintiff complaining of the desecration of a dead relative's body rarely suffers a physical harm or pecuniary loss,[114] he or she is left at the mercy of this anomalous rule.[115] While some jurisdictions allowed recovery without proof of physical and pecuniary loss, they often limited the class of potential plaintiffs by imposing the "bystanders rule," which required a plaintiff to witness injury to a third party.[116]

Because there is no uniform practice among U.S. courts,[117] the plaintiff has to ascertain whether his or her jurisdiction recognizes such a remedy. If not, he or she might be left without a remedy. Thus, a cause of action based on the negligent infliction

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110. Jaynes v. Strong-Thorne Mortuary Inc., 954 P.2d 50 (N.M. 1998).

111. *See generally id.*

112. *See* Criswell v. Brentwood Hosp., 551 N.E.2d 1315, 1318 (Ohio Ct. App. 1989).

113. Sanford v. Ware, 60 S.E.2d 10, 14 (Va. Ct. App. 1950); *Criswell*, 551 N.E.2d at 1318.

114. *Cf. Sanford*, 60 S.E. at 11 (finding that plaintiff, in addition to mental distress, incurred additional expenses in engaging another undertaker to carry out the re-interment of her deceased husband).

115. *See* Allen v. Jones, 163 Cal. Rptr. 445 (Ct. App. 1980). The defendant negligently lost in transit the remains of the plaintiff's deceased brother. *Id.* at 447. The court held that the plaintiff could recover for mental distress unaccompanied by any physical harm. *Id.* at 450. In a trenchant criticism of the distinction between damages accompanied by physical loss and others not so accompanied, Justice Gardner observed that the "distinction is not only gossamer, it is whimsical." *Id.* at 451.

116. Janicki v. Hosp. of St. Raphael, 744 A.2d 963, 973-74 (Conn. Super. Ct. 1999); Christensen v. Super. Ct., 820 P.2d 181, 209 (Cal. 1991).

117. As a U.S. court observed: "When we reach the question as to whether mental pain or suffering is a proper element of damages in such cases the courts are in hopeless conflict. Upon the principle, prevailing in some jurisdictions, that mental pain and suffering alone do not constitute a basis for the recovery of substantial damages, some courts deny a recovery for mental suffering, unaccompanied by pecuniary loss, where the wrongful act of the defendant amounts to mere negligence. Others take the opposite view. In a third class of cases a recovery is allowed for mental pain and suffering alone resulting from a wrongful act which is willful or wanton or amounts to gross negligence." *Sanford*, 60 S.E.2d at 12-13.

of emotional distress hardly provides a plaintiff with adequate remedy. Therefore, plaintiffs have sought alternative recourse by way of the legal fiction of quasi-property.[118]

2. Concept of Quasi-Property in a Dead Body

Because of such difficulties with tort claims, plaintiffs and U.S. courts often resort to the concept of quasi-property in a corpse.[119] Many times, the intent is to avoid the requirements of proving willful or wanton conduct by the defendant or the similar problem of proving accompanying physical or pecuniary loss.[120]

The concept of quasi-property is an ingenious invention by U.S. courts to help a deserving plaintiff.[121] It is a legal fiction[122] because it has no relationship with property in the legal sense.[123] It merely embodies the next-of-kin's sepulchral rights, which are not based in property, such as the right to possession and custody of the corpse for burial.[124] It also gives a right to determine the time, place and manner of burial and to have the deceased delivered to the next-of-kin in the same way as it was when life left it.[125]

In contrast, application of the concept of quasi-property has been used in both a jurisdictional and remedial sense.[126] It has proven to be a handy jurisdictional device to grant standing to a plaintiff.[127] A strict application of the British no-property rule denies standing where a plaintiff does not suffer any detriment by the desecration of property he has no right to. In *Ritter v. Couch*, the U.S. quasi-property concept recognizes that a plaintiff has an analogous property interest in a dead body that, if desecrated, would give him or her standing.[128]

In *Ritter*, the plaintiffs objected to the defendant's acquisition

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118. Carney v. Knollwood Cemetary Ass'n, 514 N.E.2d 430, 434 (Ohio 1986).
119. *Id.*
120. *See* Rao, *supra* note 99, at 385-86.
121. *Id.* at 385.
122. *See generally Carney*, 514 N.E.2d at 434.
123. *See* Pierce v. Proprietors of Swan Point Cemetery, 14 Am. Rep. 667, 676-77 (R.I. 1872).
124. Whitehair v. Highland Memory Gardens, 327 S.E.2d 438, 441 (W. Va. 1985); Diebler v. Am. Radiator & Standard Sanitary Corp., 92 N.Y.S.2d 356, 358 (N.Y. App. Div. 1949).
125. *Whitehair*, 327 S.E.2d at 441.
126. *Id.* at 440-41.
127. *Id.* at 438.
128. *See, e.g., Ritter*, 76 S.E. at 428.

of an old cemetery containing their relatives' burial sites.[129] Since the plaintiffs did not pay for the burial plots and merely had a license to bury their relatives there, the defendant contended the plaintiffs had no standing.[130] The court, using the quasi-property concept, held that the plaintiffs had standing. According to the court, "while a dead body is not property in the strict sense of the common law, it is a quasi-property, over which the relatives of the deceased have rights which our courts of equity will protect."[131]

The use of the quasi-property concept occurs more in the remedial context.[132] This concept is usually a last resort when a plaintiff's tort claim fails for the reasons already given. Thus, in *Blanchard v. Brawley*,[133] the court held that Louisiana law did not allow recovery of damages on account of a third party's injury[134] and instead, resorted to the general rule of quasi-property to find for the plaintiffs.[135] The remedial or substantive use of the concept was also evident in most of the cases cited.

The concept of quasi-property is not an adequate remedy for a plaintiff. Arguably, this concept avails only the closest next-of-kin with the result that a more distant relative (e.g., a grandchild) is denied standing.[136] In limited jurisdictions, standing has been recognized for more distant relatives as in *Carney v. Knollwood Cemetery Association*.[137]

While some U.S. courts have shown the greatest accommodation to a plaintiff, using the quasi-property concept, others have refused to resort to this concept when the plaintiff is

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129. *Id.* at 428-29.
130. *Id.* at 429.
131. *Id.* at 430.
132. Blanchard v. Brawley, 75 So. 2d 891, 893 (La. Ct. App. 1954).
133. *Id.* at 891.
134. *Id.* at 893.
135. *Id.*
136. *Carney*, 514 N.E.2d at 433. *Cf.* Christensen v. Super. Ct., 820 P.2d 181 (Cal. 1991). This case held that a funeral service contract was made for the benefit of all family members, not just the contracting family member, with the exception of unborn family members or those who were not aware of the decedent's death or the nature of the funeral contract. *Id.* Consequently, the majority held that all the family members for whose benefit a funeral service contract was made were entitled to or had standing to sue for the negligent infliction of mental distress as a result of the desecration of a deceased relative's body. *Id.* Justice Kennard, however, was prepared to limit the right of standing to only those family members statutorily entitled to control the disposition of a deceased relative. *Id.* at 206-07. Other family members, according to Justice Kennard, would have to show that they witnessed the deceased's desecration. *Id.* at 207, 213.
137. *Carney*, 514 N.E.2d at 435.

required to show pure ownership or a right to possession, as in actions for conversion or detinue.[138] In such cases, the quasi-property concept is stripped of its fictional property characteristics.[139]

For instance, in *Crocker v. Pleasant*,[140] the plaintiffs asserted an infringement of their due process right under the Fourteenth Amendment of the U.S. Constitution and failed.[141] Similarly, in *Keyes v. Konkel*,[142] the plaintiff's possessory claim of a relative's dead body, allegedly detained by an undertaker, also failed.[143] The court in *Keyes* observed that "no return of the property can be ordered in case of the replevin of a dead body"[144] and that the concept of quasi-property did not apply to "damage to the corpse as property, but rather damage to the next of kin by infringement of his right to have the body delivered to him for burial."[145] Also, in *Culpepper v. Pearl St. Bldg. Inc.*,[146] the plaintiffs used the concept to argue conversion of their son's corpse due to mistaken cremation by the defendant.[147] The court rejected "the fictional theory that a property right exists in a dead body which would support an action for conversion."[148]

U.S. courts also found the quasi-property concept unfavorable in an organ donation context because it subjects organ procurement officers to liability in circumstances that vitiate the 'gift of life' laws.[149] In *Green v. Southern Transplant Service*

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138. *See* Rao, *supra* note 99, at 382.

139. *See generally id.* at 382-87; *Ritter*, 76 S.E. 428; *Blanchard*, 75 So. 2d 891; *Carney*, 514 N.E.2d 430; Crocker v. Pleasant, 727 So. 2d 1087 (Fla. Dist. Ct. App. 1999); Keyes v. Konkel, 78 N.W. 649 (Mich. 1899); Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877 (these sources show how the concept of quasi-property was stripped of its fictional characteristics).

140. *Crocker*, 727 So. 2d at 1087.

141. *Id.* at 1089.

142. *Keyes*, 78 N.W. at 649.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Culpepper*, 877 P.2d at 877.

147. *Id.* at 880.

148. *Id.* at 882.

149. Ramirez v. Health Partners of S. Ariz., 972 P.2d 658 (Ariz. 1998); State v. Powell, 497 So. 2d 1188 (Fla. 1986). In the same circumstance, a similar claim was held to be valid in *Brotherton v Cleveland*, 923 F.2d 477 (6th Cir. 1991), *Whaley v. County of Saginaw*, 941 F. Supp. 1483 (E.D. Mich. 1996), and *Dampier v. Wayne County*, 592 N.W.2d 809 (Mich. Ct. App. 1999). However, Crocker v. Pleasant, 727 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1999) held that the ratio in *Brotherton* was contrary to the holding in *Powell*.

Inc.,[150] the plaintiff's quasi-property claim was upheld even though it involved harvesting the deceased's bone and tissue for transplantation.[151] Unlike in *Ramirez v. Health Partners of S. Ariz.*,[152] where defendants merely went beyond plaintiff's authorization to harvest additional tissue,[153] the plaintiffs in *Green* did not give authorization and the defendants did not plead immunity under the Uniform Anatomical Gift Act.[154]

In conclusion, most U.S. court decisions are revolutionary in their use of the quasi-property concept as a significant basis for U.S. law on dead bodies even though this concept does not offer comprehensive protection to a plaintiff. The continuing debate on this subject and its potential solutions, tend to obviate the defects currently used in tort-based causes of action. As such, the suggested solution found in the American Restatement of Law 2d, Torts, 274, becomes relevant.[155]

3. American Restatement of Law 2d, Torts

Section 868 of the Restatement sets out the cause of action for interference with dead bodies and provides:

> One who intentionally, recklessly, or negligently removes, withholds, mutilates or operates upon a body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.[156]

This proposed section condenses all tort and quasi-property forms of action into a single cause of action.[157] This Section, however, renounced the onerous requirements associated with the actions already discussed.[158] For example, a plaintiff seeking damages for negligent infliction of emotional distress from a desecration of a dead relative's body could file suit under Section 868, which would not require proof of a contemporaneous physical

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150. *Green*, 698 So. 2d at 699.
151. *Id.* at 701.
152. *Ramirez*, 972 P.2d at 658.
153. *Id.* at 660.
154. *Green*, 698 So. 2d at 700.
155. RESTATEMENT (SECOND) OF TORTS: INTERFERENCE WITH DEAD BODIES § 868 (1982).
156. *Id.*
157. RESTATEMENT (SECOND) OF TORTS: INTERFERENCE WITH DEAD BODIES § 868 cmt. a (1982).
158. *Id.*

or pecuniary loss, willful and wanton conduct by the defendant or the existence of a quasi-property right to the corpse.[159] This interpretation is supported by *Wallin v. University of Cincinnati Hospital*.[160]

Although Section 868 was a lethal weapon for plaintiffs, it was not a statute and did not bind the courts.[161] Additionally, Section 868 represented a minority view, especially where applied in an organ donation context, or where its application would be onerous on a defendant whose conduct was almost without reproach.[162] The result was that in the rejected cases, the courts still required the plaintiff to prove the onerous requirements under causes of action already discussed.[163]

This Section also restricted recovery and standing to "a member of the family of the deceased who is entitled to the disposition of the body."[164] Under present priority rules in the United States, the surviving spouse, in the absence of the deceased's direction, has the right of disposition against other members of the deceased's family.[165] Where the decedent had a surviving spouse and children, only the spouse would have standing and a right to recover.[166] This would be unfair to family members who might not have a right to the disposition of the deceased's body, but nevertheless suffered no less mental pain and distress than the person with a right to disposition. Close associates of the deceased, also severely distressed by the deceased's desecration, are beyond the contemplation of Section 868.[167] Based on these considerations, a later amendment to the Restatement Second removed the limitation on standing and

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159. *Id.*

160. *Wallin*, 698 N.E.2d at 531.

161. Ramirez v. Health Partners of S. Ariz., 972 P.2d 658, 665 (Ariz. 1998).

162. *Id. See also* Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 881 (Colo. 1994); *Wallin*, 698 N.E.2d at 532.

163. *Ramirez*, 972 P.2d at 663; *Culpepper*, 877 P.2d at 881; *Wallin*, 698 N.E.2d at 432.

164. RESTATEMENT (SECOND) OF TORTS: INTERFERENCE WITH DEAD BODIES § 868 (1982).

165. Felipe v. Vega, 570 A.2d 1028, 1030 (N.J. Super. Ct. Ch. Div. 1989).

166. *Id.*

167. *See* RESTATEMENT (SECOND) OF TORTS: INTERFERENCE WITH DEAD BODIES § 868 (1982). *But see* Christensen v. Super. Ct., 820 P.2d 181, 206 (Cal. 1991). The dissenting opinion of Justice Mosk held that a close business associate of the deceased should be allowed to recover for infliction of emotional distress resulting from the abuse of the deceased's body. *Id.*

recovery by family members.[168]

Lastly, if Section 868 represents a synthesis of the various causes of action, then its semantic formula presents difficulties for interpreting and seeking a remedy. In other words, a strict literal construction of the Section would limit its application to cases of physical interference with a dead body.[169] For example, an unjustified exhibition of a decedent's autopsy picture would not come within the terms of the Section.[170]

Florida's District Court of Appeals confronted a similar problem in *Williams v. City of Minneola*,[171] which was a case of first impression. There, the investigating police officers took pictures and videotape of the anatomical examination during an autopsy of the plaintiff's deceased child who died suspiciously.[172] The pictures and videotape, which were disseminated to non-members of the police team in a private gathering and later published in a newspaper, captured the plaintiffs' attention.[173] The plaintiffs brought an action for damages for the negligent infliction of emotional distress and tortious interference with a dead body.[174] Though the majority found for the plaintiff for negligent infliction of emotional distress, it held that a cause of action for interference with a dead body was not proved under Section 868. The court held:

> [In] theory [interference with a dead body] must fail simply because the appellees did not interfere with a dead body. An invariable component of the tort is some action affecting the physical body itself, such as removing it, withholding it, mishandling it, mutilating it, or preventing its proper burial. . . . Publication of a photograph of a body does not, in the absence of a showing of actionable trespass on the body as such, amount to an interference with the possessory or burial rights of another.[175]

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168. RESTATEMENT (SECOND) OF TORTS: INTERFERENCE WITH DEAD BODIES § 868, reporter's note 75 (1982).

169. Similarly, Justice Whitbeck observed: "[A] cognizable claim for the mutilation of a dead body is not sufficiently broad to encompass a claim for its decomposition, which does not involve the active incision, dismemberment, or evisceration of the body. . . ." Dampier v. Wayne County, 592 N.W.2d 809, 816 (Mich. Ct. App. 1999).

170. Williams v. City of Minneola, 575 So. 2d 683, 695 (Fla. Dist. Ct. App. 1991).

171. *Id.*

172. *Id.* at 685-86.

173. *See id.* at 686.

174. *Id.*

175. *Id.* at 688-89 (citations omitted).

Thus, the majority interpreted Section 868 to establish a single tort, but held that the element of physical interference was lacking.[176] Justice Griffin's dissent held that an unjustified publication of a decedent's autopsy picture was interference within the terms of Section 868.[177] This minority judgment is more likeable if we retain the advantages of the Section as establishing a single tort embodying the positive sides of the previous categories and renouncing the obstacles. These advantages will be lost in an interpretation that imposes a requirement of physical interference with a dead body. That requirement will limit the reach of this Section. Interestingly, the Supreme Court of Canada again held, in *R v. Moyer*,[178] that physical interference with a corpse was not a necessary element of interfering with a dead body under the Canadian Criminal Code.[179]

Physical interference may not be the basis of a cause of action as recognized by Section 868 and illustrated in *Finn v. City of New York*.[180] In *Finn*, the plaintiff suffered mental anguish when the City of New York, due to a lapse in its system for reporting deaths, failed to notify the plaintiff of her husband's death until eight days after his demise.[181] Meanwhile, the deceased was deposited in a morgue under the control of the city.[182] There was no question of physical abuse or any indignity inflicted upon the dead body; the cause of action was based on negligent withholding of the death information.[183] This case, however, was not treated significantly different from cases of tortious withholding of a dead body, and Justice Sullivan observed:

> But what of a situation where, as here, the anguish and torment were caused not by withholding the body but by withholding the fact of death. It is a fact that throughout the eight days of her husband's disappearance, plaintiff nurtured the hope and belief that he was still alive; she had no knowledge that he was dead and that his corpse was at the morgue in the custody of the City. Thus, her anguish was the result not of being deprived of the possession of his remains for proper burial, an injury which

176. *See id.*
177. *Id.* at 695-96.
178. R. v. Moyer, [1994] S.C.R. 899.
179. *Id.* at 908.
180. *See generally* Finn v. City of New York, 335 N.Y.S.2d 516 (N.Y. Civ. Ct. 1972).
181. *Id.*
182. *Id.*
183. *Id.* at 520.

> for its existence must be based on knowledge of the fact that death has occurred, but of not knowing of such occurrence. If the principle that one may not tortiously withhold a deceased's body is to have efficacy, then the law must recognize as a corollary thereof, and this Court so holds, that one may not tortiously withhold notification of death.[184]

Though this case was not decided under Section 868, or even explicitly cited, the court suggested that the *ratio* should inspire its interpretation.[185] It showed the futility of the distinction between emotional distresses resulting from physical interference versus non-physical interference that, nevertheless, might be of "much greater severity."[186] The intent of the law was to provide a remedy for emotional distress resulting from unjustifiable actions toward a dead body.[187] Limiting a remedy to cases of physical interference with a corpse detracted from this laudable legal objective.[188]

The result is that approaches and solutions with regard to the law on dead bodies are still very much unsettled in U.S. jurisprudence, as in most other places of the world. This puts the current debate in proper perspective. Although the quasi-property concept provides some succor to a plaintiff by finding for a full property interest in a dead body or tissue, it may not provide the desired global protection to a plaintiff. Can a full property rule provide an escape from the defects already inherent in the current legal categories or forms of action? What will be the conceptual framework for finding a full property right in a human body? Is

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184. *Id.* at 521.
185. *See id.*
186. *Id.* at 522.
187. *See id.*
188. Wallin v. Univ. of Cincinnati Hosp., 698 N.E.2d 530, 531-32 (Ohio Ct. Cl. 1998). The law is gradually de-emphasizing the fact of physical interference as a basis for a cause of action relating to a dead body. In one case, the mental distress resulted mainly from the publication of a false report of the deceased's HIV status. *Id.* at 531. There was no physical abuse of the deceased's body. *See id.* at 532-33. The court held, however, that the plaintiffs failed to prove defendant's negligence or that the defendant was responsible for the publication of the false report in that case. *Id.* In another case, the mental distress resulted from the defendant's negligence in not notifying plaintiffs of the death of their son, who was found dead in Florida and buried by the defendant without adequate notification of the plaintiff/parents. Crocker v. Pleasant, 727 So. 2d 1087, 1088 (Fla. Dist. Ct. App. 1999). The court held that a prima facie case for tortious interference with a dead body was made. *Id.* at 1089. The plaintiffs, however, did not claim the tort but, instead, brought a constitutional claim under the Fourteenth Amendment. *Id.* at 1088. The court held that the property element of the Fourteenth Amendment was not established and, therefore, affirmed the lower court's dismissal of plaintiffs' claim on this issue. *Id.* at 1089.

our global community ready for such a legal perspective, and what are the bases of possible objection to the objectification of the human body? Does recent technology justify a finding of a full property interest in a dead body or human tissue?

III. THE DOMINANT PARADIGMS OF PROPERTY

It is possible to posit various models of property, but there are two dominant senses in which the word 'property' is understood: a physical or tangible thing, which is the reified perspective, and a bundle of rights.[189]

A. The Reified Perspective of Property

Generally, a person is said to own or have property rights in a thing that belongs to that person, such as a chair, book, car or pen. This is referred to as the reified perspective of property because it targets or looks at the thing itself.[190] This is the way that most writers of the last century and before understood property.[191] Strahan, writing in 1895, observed:

> [O]nly things which can be owned are determinate things, that is, an actually existing physical object. . . .We cannot in this sense own a debt, or a patent, or a copyright, all of which are mere creations of the law, without any physical embodiments over which physical power can be exercised. Accordingly,

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189. A third, less dominant model of property, is known as the personhood conception of property. This view sees property as the embodiment or extension of a person's personality. Therefore, on this perspective, property is entitled to the best protection by law. *See* Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-60 (1982); TASLIM O. ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 169-70 (Manchester Univ. Press 1956). Applying the personhood analysis to the human body, it is argued that since the human body is most representative of a person's identity and sense of being, it therefore qualifies as property and is entitled to legal protection on that basis. Bray, *supra* note 96, at 215 (1990). If property, however, is a mere embodiment or extension of one's personality, then it is doubtful whether it will satisfy the criteria of identifiably, permanence and transferability, which are the hallmarks of a property interest. The personhood analysis also seriously questions the general view that property deals with the legal relationship between a person and an object. Jeremy Waldron, *What Is Private Property?* 5 OXFORD J. OF LEGAL STUD. 313 (1985); Michael A. Heller, *The Dynamic Analytics of Property*, 2 THEORETICAL INQUIRIES IN L. 79 (2001); Daphna Lewinsohn-Zamir, Comment, *Contemporary Property Law Scholarship*, 2 THEORETICAL INQUIRIES IN L. 97 (2001); Hanoch Dagan and Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001).

190. Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CA. INTERDIS. L.J. 401, 401 (2000).

191. *Id.* at 403-405.

strictly speaking, such rights are not property . . . .[192]

John Locke,[193] John Austin[194] and William Blackstone[195] espoused the reified perspective of property. The basis that the above perspective restricted property to physical and tangible things was its theoretical anchorage in control and dominion over a thing or the ability to alter the original nature of a thing by the expenditure of labor.[196] The principle is that once control or dominion exists over a thing, or alters it from its original naturally occurring state, then it was your property.[197]

This idea of control and alteration led Locke to postulate that every person had a proprietary interest in his or her body. He said:

> [T]hough the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his *person*: this no body has any right to but himself. The labour of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, left it in, he hath mixed his *labour* with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to.[198] (emphasis added).

Locke's statement could be a foundation for a property right in a human body. But his statement was based on a declining theory of property (i.e., control, dominion or alteration of a thing) and was not generally shared by writers who addressed the topic

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192. JAMES ANDREW STRAHAN, A GENERAL VIEW OF THE LAW OF PROPERTY (Stevens & Sons, Ltd. 2d ed. 1897)(1895).

193. *See generally* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon, ed., The Liberal Arts Press, Inc. 1952).

194. *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (John Murray ed., 1863).

195. *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (U. of Chi. Press 1979).

196. *See* LOCKE, *supra* note 193 at 17.

197. As Strahan rationalized: "Material things, however, of which physical possession has been taken by no one, are the property of no one (*res nullius*). Thus, wild birds, wild beasts, fish in rivers or in the sea, belong to nobody until they are captured, when they become, as a rule, the property of the captor . . . . As long as he keeps possession of them his property in them continues; but should they escape completely out of his possession they are again *res nullius*, and will become the property of the first person who recaptures them." STRAHAN, *supra* note 192, at 3.

198. LOCKE, *supra* note 193, at 17.

during the same period and thereafter.[199] For instance, while Austin was willing to restrict property to things, he could not ascribe proprietary interest to the human body except by way of analogy: "I have a right in my own person which is analogous to the right of property in a determinate thing."[200] Even the reified perspective of property offers no consensus that a human body or tissue could be the subject of property.[201]

A view of property restricted to physical things was bound to be unworkable in a dynamic and modern society where technology development tremendously pushed the frontiers of property beyond its objectified conception.[202] This era witnessed new forms of property, which were intellectual creations and knowledge-based.[203]

Biomedical inventions and research materials, such as gametes, cell lines and tissue samples that take physical form, prove that the reified perspective of property offers the greatest protection to a deserving plaintiff.[204] This protection is not available under the "bundle of rights" perspective.[205] The courts, in a good number of cases, have resorted to this conception of property when human tissue is involved.[206]

Historically, the reified perspective of property was applied to

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199. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 171-172 (Appleton 1887). "The essential principle of property being to assure to all persons what they have produced by their labor and accumulated by their abstinence, this principle cannot apply to what is not the produce of labor, the raw material of the earth." *Id.* Further, he observed, "The institution of property, when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it. . .together with his right to give this to any other person if he chooses, and the right of that other to receive and enjoy it." *Id.*

200. *See* AUSTIN, *supra* note 194, at 7; *See also* STRAHAN, *supra* note 192, at 4. "Physical objects alone, then, are subjects of ownership. But all physical objects cannot be owned. For example, there cannot by English law be any property in a human body, living or dead, though the executors of a dead testator are entitled to possession of his body for the purpose of burial. . . .With this exception, however, it may be said generally that any material thing of which physical possession can be taken, may be owned." *Id.*

201. *Id.*

202. *See generally* MILL, *supra* note 199.

203. Lester Thurow, *Globalization: The Product of a Knowledge-Based Economy*, 570 THE ANNALS 19 (2000).

204. Kojo Yelpaala, *Owning the Secret of Life: Biotechnology and Property Rights Revisited*, 32 MCGEORGE L. REV. 111, 154 (2000).

205. *See* STEPHEN R. MUNZER, A THEORY OF PROPERTY 22-23 (Jules Coleman ed., 1990).

206. *See, e.g.*, Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991).

purely physical and non-human objects of property.[207] Courts have recently applied this view to biomedical technology, which created new forms of property.[208] These cases show judicial ingenuity by adapting a legal concept cast in different historical circumstances to present day economic and scientific realities.[209]

In *Cornelio v. Stamford Hospital*,[210] the plaintiff brought an action in detinue to recover possession of a pathology slide that contained the tissue sample used in testing her for cancer.[211] She alleged that the tissue sample was her property and was wrongly detained by the defendant.[212] Although the case was decided using a Connecticut statute and the plaintiff was not entitled to her non-duplicable medical record,[213] the majority assumed that the plaintiff had a property interest in her body tissue.[214] The dissent was far more eager to find a property interest in the plaintiff's body tissue as a privacy interest endangered by biomedical science and technology.[215]

In *Janicki v. Hospital of St. Raphael*,[216] the plaintiffs brought action after their stillborn fetus was dissected against their expressed wishes.[217] The court held that a nineteen-week-old stillborn fetus was neither property nor mere tissue; rather it occupied a position of special respect entitled to legal protection.[218] The court applied the concept of quasi-property and property-like analysis to award damages to the mother.[219]

Similarly, the court in *Green v. Southern Transplant Service*[220] held that the deceased's mother, stepfather, and siblings had a cause of action for the unauthorized harvesting of the deceased's bone and tissue. It is unclear, however, what type of theoretical analysis the court proffered.[221]

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207. Litowitz, *supra* note 190.
208. Yelpaala, *supra* note 204, at 113.
209. *See Brotherton*, 923 F.2d at 480-82.
210. Cornelio v. Stamford Hosp., 717 A.2d 140 (Conn. 1998).
211. *Id.* at 142.
212. *Id.* at 143.
213. *Id.* at 148.
214. *Id.* at 143-44.
215. *See id.* at 149-50.
216. Janicki v. Hosp. of St. Raphael, 744 A. 2d 963 (Conn. Super. Ct. 1999).
217. *Id.* at 964.
218. *Id.* at 971.
219. *Id.* at 967-70.
220. Green v. S. Transplant Serv., 698 So. 2d 699 (1997).
221. *Id.* at 701-02.

In *United States v. Arora*,[222] the personal animosity between two scientists employed by the National Institute of Health reached its peak when one of them maliciously destroyed cultured human cells produced by the other.[223] The United States brought a civil action for conversion against the delinquent researcher.[224] The court, using a pure property analysis, held that the cell, though a product of a living body, was property capable of conversion:

> The court thus sees no reason why a cell line should not be considered a chattel capable of being converted. Indeed, if such a cause of action is not recognized, it is hard to conceive what civil remedy would ever lie to recover a cell line that might be stolen or destroyed, including one with immense potential commercial value, as this one apparently had and has.[225]

These cases illustrate the court's reluctance in protecting the body, tissue and sentiment of the dead by extending the application of a property concept grounded in common law. This protection is imperative because of the now intense demand for human body parts and tissues by biomedical and scientific researchers.[226] As a result of this demand, an outrageous trend exists where crematory and mortuary officials are becoming major merchants in body organs illegally harvested from cadavers,[227] with researchers, biomedical research companies and scientists as ready buyers.[228]

This judicial inclination toward protection was evident in *Moore v. Regents of the University of California*.[229] The plaintiff underwent a splenectomy for the treatment of hairy-cell leukemia.[230] In the course of treatment, his physician, also a researcher, noticed that the plaintiff had unique cells that were valuable for scientific research.[231] The physician appropriated the plaintiff's excised cells and, under the guise of treatment, obtained

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222. United States v. Arora, 860 F. Supp. 1091 (D. Md. 1994).
223. *Id.* at 1092.
224. *Id.*
225. *Id.* at 1099.
226. *See* Ronald Campbell et al., *Researchers' Use of Bodies Stirs Emotion, Controversy*, DALLAS MORNING NEWS, Apr. 21, 2000, at A37.
227. *See* Christensen v. Super. Ct., 820 P.2d 181 (Cal. 1991).
228. Perry, *supra* note 3.
229. Moore v. Regents of Cal., 793 P.2d 479 (Cal. 1990).
230. *Id.* at 481.
231. *Id.*

more cell samples from the plaintiff.[232] The physician, along with his associates, used the plaintiff's cells to produce a cell line with enormous potential for producing therapeutic and pharmaceutical products.[233]

Among other causes of action, the plaintiff brought an action for conversion of his bodily materials.[234] The plaintiff's conversion argument could only succeed if he could establish a property interest in his bodily materials.[235] In view of the clandestine nature of his physician's activity, the case cried out loudly for justice. The court, using the reified perspective of property, held:

> Plaintiff's spleen, which contained certain cells, was something over which plaintiff enjoyed the unrestricted right to *use, control and disposition.* The rights of dominion over one's own body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a subterfuge to call them something else.[236] (emphasis added)

As desirable as this view is, it is still open to criticism. If property in one's body is based on control and dominion, we may revert to early civilization when one could have human property by sheer force, control, domination or subjugation.

The *Moore* court, like John Locke, realized this undesirable situation and limited the property right to one in which every person has a property interest in only his or her own body.[237] This fear of commodification or objectification, much as it is legitimate and potentially realizable, does not seem compelling enough to mitigate against a finding of property in the human body.[238] In fact, "propertization" of the human body may be an effective way to check unauthorized harvesting of human organs and prevent commodification.[239] We saw this reasoning in the *Arora* case.[240]

Critics of the reified view argue it is absurd. If control and dominion over a thing is a sufficient basis for acquiring property, why does person A have no property interest in person B when

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232. *Id.*
233. *Id.* at 481 n.2.
234. *Id.* at 482 n.4.
235. *Id.* at 488-89.
236. *Id.* at 505.
237. *Id.* at 504.
238. *Id.*
239. United States v. Arora, 860 F. Supp. 1091, 1099 (D. Md. 1994).
240. *Id.*

person B is under the control and dominion of person A? This apparent absurdity is justified by the compelling interest of giving heightened protection to the human body and its privacy interests when those interests are capable of invasion by recent biomedical technology.[241] In this regard, logical consistency should bow to socio-economic and scientific realities.

For policy reasons, the California Supreme Court held in *Moore* that the plaintiff did not have a conversion claim.[242] The court was concerned about the negative impact on scientific activities of public importance.[243] The court, however, anticipated the possibility of a future decision in favor of property interests in one's own body.[244] It stated that the plaintiff in *Moore* established a cause of action based on lack of informed consent.[245] The dissent, however, stated that the plaintiff established a property interest in his body based on this exercise of control and dominion.[246]

Disputes over frozen embryos, pre-embryos or sperm illustrate interesting applications of the reified perspective of property to biological materials.[247] In *Hecht v. Superior Court*,[248] the deceased's partner, in attempting to posthumously procreate, sought judicial assistance to release the deceased's cryogenically preserved sperm to the plaintiff.[249] The deceased's children opposed the release of their father's sperm, arguing it is against public policy to artificially inseminate a single woman with a deceased's sperm for posthumous procreation.[250]

The court held that there was no such public policy.[251] Because the dispute was litigated in probate court, where jurisdiction is mainly limited to a decedent's property,[252] the court determined whether it had jurisdiction over the deceased's sperm.[253] The court reasoned that because the deceased had

241. Rao, *supra* note 99, at 368.
242. *Moore*, 793 P.2d at 497.
243. *Id.* at 487-88.
244. *Id.* at 493.
245. *Id.* at 483.
246. *Id.* at 500-03.
247. *See* Davis v. Davis, 842 S.W.2d. 588 (Tenn. 1992).
248. Hecht v. Super. Ct., 20 Cal. Rptr. 2d. 275 (Ct. App. 1993).
249. *Id.* at 276.
250. *Id.* at 284.
251. *Id.* at 287-89.
252. *Id.* at 280.
253. *Id.* at 281.

authority over his sperm during his lifetime, the sperm was property.[254] The court further stated that the decedent's frozen sperm was a "unique type of 'property,'" and therefore part of his estate.[255]

In *Hecht*, the court made a conscious effort to expand an existing category of property to include a new form of property, such as genetic or reproductive material.[256] *Hecht* also endorsed the earlier case of *Davis v. Davis*,[257] holding that a couple's decision-making authority over the disposition of pre-embryos was based on property interests.[258]

The above decisions, notwithstanding the defects of the reified perspective of property, are justified by the imperatives of this biomedical age. The reified perspective of property is again used in the Supreme Court of Western Australia case of *Roche v. Douglas*.[259] The case was a paternity suit where the plaintiff applied for a DNA analysis of the deceased's tissue sample.[260] The success of the plaintiff's application turned on whether the deceased's body tissue qualified as property.[261]

The court noted that most British and Australian decisions concerning dead bodies were inapplicable because they did not account for recent biomedical technology, such as DNA techniques.[262] The court stated that, in addition to the procedural advantages of finding a proprietary interest in the deceased's tissue (i.e., saving in time, cost and quantum of evidence), "it defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken to effect destruction. There is no purpose to be served in ignoring physical reality."[263]

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254. *Id.*
255. *Id.* at 283.
256. *Id.* at 290-91.
257. *Id.* at 281; *see also* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
258. *Davis*, 842 S.W.2d at 597.
259. Roche v. Douglas (2000) WASC 146, http://www.austlii.edu.au/au/cases/wa/WASC/2000/146.html (June 7, 2000).
260. *Id.*
261. *Id.*
262. *Id.*; *see also* Sharon McEldowney & Lynda M. Warren, *The New Biology: A Challenge to Law*, 1 INT'L J. BIOSCIENCES & L. 315 (1998).
263. Roche v. Douglas (2000) WASC 146, http://www.austlii.edu.au/au/cases/wa/WASC/2000/146.html (June 7, 2000).

B. Bundle of Rights Perspective

Property has increasingly been recognized as a bundle of rights.[264] These rights or interests recognized as property are often intangible and may include intellectual property rights, the right of way,[265] the duty not to dilute the salinity level in water above one's leased sea bed[266] and the right of access to a navigable river.[267] In the U.S. Supreme Court case of *Scranton v. Wheeler*,[268] Justice Shiras observed: "The term "property," standing alone, includes everything that is the subject of ownership. It is a *nomen generalissium* extending to every species of valuable right and interest, including things real and personal, easements, franchises, and other incorporeal hereditaments."[269]

Property encompasses a great variety of intangible rights and interests.[270] The greatest exercise of these rights is what constitutes ownership.[271] As Jackson observed: "A synonym for a proprietary interest is "ownership," which, however, is sometimes said to describe the highest possible such [sic] interest rather than the concept in general."[272]

Identifying property as representative of a bundle of rights, however, does not solve the definitional problem. Does every piece in the bundle of rights qualify as property? A person may have some interest or right in his or her body, but does that body qualify as property? These questions require an inquisition into the nature and prerequisites of a "right" of property.

C. Nature of Proprietary Interests and Rights

For a right to come within the realm of property, it must possess a particular nature, (such as be identifiable, transferable, devisable and have monetary value)[273] otherwise the right does not legally qualify as property.[274] The famous exposition of this

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264. DAVID C. JACKSON, PRINCIPLES OF PROPERTY LAW 10 (Law Book Co., Ltd. 1967); *See also* BRUCE ZIFF, PRINCIPLES OF PROPERTY LAW 1-3 (1993).
265. *See* Preseault v. United States, 100 F.3d 1525 (1996).
266. *See* Avenal v. United States, 100 F.3d 933 (1996).
267. *See* Yates v. Milwaukee, 10 U.S. 497 (1870).
268. Scranton v. Wheeler, 179 U.S. 141 (1900).
269. *Id.* at 170.
270. *See* JACKSON, *supra* note 264, at 10-11.
271. *Id.* at 11 n.21.
272. *Id.* at 11 (citations omitted).
273. *Id.* at 1248.
274. Nat'l Provincial Bank, Ltd. v. Ainsworth, A.C. 1175, 1247-1248 (H.L. 1965).

principle remains Lord Wilberforce's dictum in *National Provincial Bank Ltd. v. Ainsworth*.[275]

In *Ainsworth*, a deserted wife remained on the matrimonial property that was mortgaged by her husband to a bank.[276] She argued that being the mortgagor's wife gave her an interest in the matrimonial property even though it was legally owned by her husband.[277] She claimed that this interest was sufficient to override the bank's legal mortgage.[278] Thus, the case turned on the nature of the property interest asserted by the wife. Lord Wilberforce declared:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities, it is characterized by the reverse of them.[279]

The above reasoning does not stand alone, as it has been applied in other jurisdictions and is supported by academic writers.[280] In *First Victoria National Bank v. United States*,[281] the court observed:

> An interest labeled 'property' normally may possess certain characteristics: it can be transferred to others; it can be devised and inherited; it can descend to heirs at law; it can be levied upon to satisfy a judgment; it comes under the jurisdiction of a bankruptcy court in a bankruptcy proceeding; it will be protected against invasion by the courts; it cannot be taken away without due process of law.[282]

The court added a caveat to the otherwise settled proposition on the nature of property interests:

> An interest may qualify as 'property' for some purposes even

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275. *Id.* at 1175.
276. *Id.* at 1176.
277. *Id.*
278. *Id.*
279. *Id.* at 1247-48.
280. *See* JACKSON, *supra* note 264, at 16 (stating "The distinction between proprietary and personal interests may be said to rest either on whether or not the holder is given the ability: (i) to 'deal with' the interest by transferring it to another, or (ii) to recover the interest should he lose it, or (iii) bring an action with respect to the interest against a person or persons other than the grantor.").
281. First Victoria Nat'l Bank v. United States, 620 F.2d 1096 (5th Cir. 1980).
282. *Id.* at 1103-04.

> though it lacks some of these attributes. For example, an individual can have a 'property' right in his job . . . so that he cannot be fired without appropriate procedural safeguards; yet the job is not assignable, transferable, descendible, or devisable. The 'right to publicity' is transferable during life. . .but may not be devisable.[283]

It seems the most lucid application of the *Ainsworth* principle is shown by cases dealing with the property status of university degrees.[284] This often arises in a divorce situation where a spouse asserts that a university degree or professional qualification acquired by the other spouse during the marriage is community property subject to division upon the dissolution of marriage.[285]

In the Canadian case of *Berghofer v. Berghofer*,[286] the Court of the Queen's Bench, relying on the earlier Ontario High Court decision of *Caratun v. Caratun*,[287] held that a university degree obtained during the marriage of the couple was an asset that should be considered in an action under the Matrimonial Property Act.[288] This was notwithstanding the fact that a university degree, by its intrinsic nature, does not possess the factors stipulated by the court in the *Ainsworth* case.[289]

Beyond relying upon the decision in *Caratun*, the court did not provide any theoretical anchorage for holding that a university degree qualified as property.[290] Furthermore, the precedential value of that decision is almost nil because it was overruled.[291]

Another case that ascribed proprietary value to a university degree, though it is not transferable, is *Woodworth v. Woodworth*.[292] The issue was whether the plaintiff's law degree was marital property subject to distribution.[293] The case confronted the social and economic realities of a wife who gave her husband moral support and stood by him in the course of his

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283. *Id.* at 1104.

284. *See* Wilbur M. Roadhouse, *The Problem of the Professional Spouse: Should an Educational Degree Earned During Marriage Constitute Property in Arizona?*, 24 ARIZ. L. REV. 963 (1982).

285. *Id.* at 963-65.

286. Berghofer v. Berghofer, [1988] Alta. L.R.2d 186.

287. Caratun v. Caratun, [1987] D.L.R. 398 (Can.).

288. *Berghofer*, Alta. L.R.2d at 188.

289. *Ainsworth*, A.C. at 1247-48.

290. *Berghofer*, Alta. L.R.2d at 188.

291. Caratun v. Caratun, [1993] D.L.R. 404, 414-15 (Can.).

292. Woodworth v. Woodworth, 337 N.W.2d 332 (Mich. 1983).

293. *Id.* at 333.

studies. The court observed:

> Plaintiff contends that his law degree is not such a marital asset. We disagree.
>
> The facts reveal that plaintiff's law degree was the end product of a concerted family effort. Both parties planned their family life around the effort to attain plaintiff's degree. Toward this end, the family divided the daily tasks encountered in living. While the law degree did not preempt all other facets of their lives, it did become the main focus and goal of their activities. Plaintiff left his job in Jonesville and the family relocated to Detroit so that plaintiff could attend law school. In Detroit, defendant sought and obtained full time employment to support the family.
>
> We conclude, therefore, that plaintiff's law degree was the result of mutual sacrifice and effort by both plaintiff and defendant. While plaintiff studied and attended classes, defendant carried her share of the burden as well as sharing vicariously in the stress of the experience known as the "paper chase". [sic]
>
> We believe that fairness dictates that the spouse who did not earn an advanced degree be compensated whenever the advanced degree is the product of such concerted family investment. The degree holder has expended great effort to obtain the degree not only for him or herself, but also to benefit the family as a whole. The spouse has shared in this effort and contributed in other ways as well, not merely as a gift to the student spouse nor merely to share individually in the benefits but to help the marital unit as a whole.[294]

It is evident that this view does not make any conceptual analysis of property before holding that a university degree qualified as such. The court, in characterizing a university degree as property, without subjecting it to a strict application of the concept of property, was primarily concerned with preventing a miscarriage of justice.[295] But justice was achieved by a misconception and misapplication of the concept of property.

Moreover, *Berghofer*[296] and *Woodworth*[297] are completely

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294. *Id.* at 334.
295. *Id.* at 335.
296. *Berghofer*, 11 A.C.W.S. at 29.

limited by other cases holding the contrary.[298] In *Caratun*,[299] it was argued that a dental license acquired by a spouse in the course of the marriage was property for the purpose of the Family Law Act. The Ontario Court of Appeal overruled the decision of the trial court and observed:

> One of the traditional *indicia* of property is its inherent transferability. That transferability may, of course, be precluded either by law or contract. In contrast, the right or licence to practise a particular profession is by its very nature a right personal to the holder, incapable of transfer, ... [r]ights or things which are inherently non-transferable, such as the right to practise a profession, clearly do not constitute property in any traditional sense.[300]

Similarly, the Supreme Court of Colorado case of *In re Marriage of Graham*[301] observed:

> An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of 'property.' It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder and is not inheritable .... It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[302]

Thus, in order to qualify as property, the object must be assignable, transferable and capable of being sold or pledged or reasonably permanent and identifiable.[303] The question, for the

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297. *Woodworth*, 337 N.W.2d at 332.

298. *See* Lesman v. Lesman, 452 N.Y.S.2d 935 (App. Div. 1982); Mahoney v. Mahoney, 442 A.2d. 1062 (N.J. App. Div. 1982); Wisner v. Wisner, 631 P.2d 115 (Ariz. 1981); Frausto v. Frausto, 611 S.W.2d 656. (Tex. Civ. App. 1980); Nastrom v. Nastrom, 262 N.W.2d 487 (N.D. 1978); Muckleroy v. Muckleroy, 498. P.2d 1335 (N.M. 1972); Todd v. Todd, 78 Cal. Rptr. 131 (Cal. Ct. App. 1969); *In re* Marriage of Sullivan, 184 Cal. Rptr. 796 (Cal. Ct. App. 1982); *In re* Marriage of Goldstein, 423 N.E.2d 1201 (Ill. App. Ct. 1981); *In re* Marriage of McManama, 399 N.E.2d 371 (Ind. 1980).

299. *Caratun*, D.L.R. at 404.

300. *Id.* at 409-10.

301. *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978).

302. *Id.* at 77.

303. *Id.*

purposes of this article, then becomes: does a human tissue, body or corpse satisfy the above requirements? Obviously, the answer is no, if the *Ainsworth* principle is applied and a blind eye is turned to scientific and economic realities.

This appears to be the approach taken by the Supreme Court of Colorado in *Culpepper v. Pearl St. Bldg Inc.*[304] The plaintiffs' deceased son was mistakenly cremated by the defendant.[305] The success of the plaintiffs' claim, which included damages for conversion of the deceased's body,[306] depended on whether the plaintiffs could show a property interest in their dead son's body.[307]

The court dismissed the claim on the basis that the plaintiffs had no property interest in their son's corpse.[308] The court explained that a dead body is not commercially transferable, has no monetary value and, therefore, is not property.[309] The measure of damages for conversion depends on the market value of the converted good,[310] which, in a corpse, is unascertainable.[311] Therefore, the *Ainsworth* principle excludes property in dead human bodies or living body tissues because they inherently lack the indicia of property.[312]

D. Ainsworth's Case and Biomedical Technology

The proposition in *Ainsworth* was cast in the mold of common law during a period that had not witnessed the tremendous biotechnological advances of today.[313] Marketability and commercial transferability are no longer the touchstones of an object's value. This partly explains why common law does not recognize corpses as property. But times have changed and common law has not caught up with the realities of today.

First, corpses, once thought to be intrinsically non-transferable or commercially unviable have now acquired pecuniary value as important raw materials in biomedical

304. *Culpepper*, 877 P.2d 877 (Colo. 1994).
305. *Id.*
306. *Id.* at 879.
307. *Id.* at 880.
308. *Id.* at 882.
309. *Id.* at 880.
310. *Id.* at 882 n.6.
311. *Id.*
312. *Nat'l Provincial Bank*, A.C. at 1247-48.
313. *Onyeanusi*, 952 F.2d at 792.

research.[314] Second, though human body parts may be considered intrinsically non-commodifiable, biomedical technology has jeopardized their safety[315] such that substantial legal protection, analogous to the protection given to property, is now desirable.[316] For the law to serve society as an instrument of social engineering, it must be able to respond meaningfully to changing socio-economic dynamics.[317] The law has shown this adaptability and flexibility in the past by acknowledging a property interest in one's job or personality.[318]

Mary Glendon[319] chronicled the socio-economic considerations underpinning the movement toward property rights in one's job and the judicial recognition of such rights.[320] Since the 1970s, there has been a significant increase in the number of people employed.[321] These people's lives depend on wages and other employment benefits. For many, salary and employment benefits have come to represent wealth and economic security. Glendon argues that to maintain this new status, the law should ensure reasonable stability in employment remains.[322]

The movement toward property rights in one's job contributed to the limitations on the employer's right to arbitrarily terminate an employee's employment in the United States and in many other countries.[323] Many courts facilitated the needed protection by defining employee rights as property.[324] Thus, an employee had a property interest in his or her job, not because it

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314. *Id.* In another case, it was held that a corpse satisfied the criteria of ownership, in that it could be the subject of custody, control and disposition by the next of kin. Pettigrew v. Pettigrew, 56 A. 878, 879-80 (Pa. 1907).

315. *See, e.g.*, Moore v. Regents of Cal., 793 P.2d 479, 481 (Cal. 1990) (discussing an incident where body tissue was taken from a patient without his consent for use in biomedical research); *Christensen*, 820 P.2d at 181 (discussing a biomedical company engaged in illegal trade on cadaver organs); R. v. Stillman, [1997] S.C.R. 607, 609 (1997) (discussing the situation where police authorities obtained a detainee's mucous tissue, without his consent, for DNA testing).

316. E.g., Cornelio v. Stamford Hosp., 717 A.2d 140, 149 (Conn. 1998) (McDonald, J., dissenting).

317. *Moore*, 793 P.2d at 507.

318. Donald H. J. Herman & Yvonne S. Sor, *Property Rights In One's Job: The Case For Limiting Employment-At-Will*, 24 ARIZ. L. REV. 763, 780 (1982).

319. MARY A. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY, 101-245 (1981).

320. *Id.* at 143-70.

321. *See id.*

322. *Id.* at 163.

323. *Id.* at 150-53.

324. Herman et al., *supra* note 318, at 778-80.

was transferable, but rather to synchronize the law with the economic realities of employment.[325]

At present, the main source of wealth for biotech companies is knowledge.[326] Raw materials for biomedical research include cells and tissue samples.[327] Biomedical research has contributed to the health and social well-being of society.[328] To maintain social value,[329] the law should provide sufficient and balanced protection to the raw materials and products of biomedical research.[330] The law has already allowed patent protection to biological products, previously thought to be unpatentable.[331]

For example, in *Diamond v. Chakrabarty*,[332] the court held that genetically engineered bacteria was patentable. Furthermore, in *President and Fellows of Harvard College v. Canada (Commissioner of Patents)*,[333] the court held that an oncomouse, a transgenic non-human mammal genetically engineered for use in cancer studies, was patentable.[334] These two cases reveal an effort by the courts in Canada and the United States to align the law with the present realities of science and everyday life.[335]

These recent decisions show that *Ainsworth* does not provide an immutable criteria for property[336] and applying such a rule is counterproductive to biological forms of property. Therefore,

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325. *Id.*

326. Yelpaala, *supra* note 204, at 154.

327. *Id.* at 154-155.

328. *Id.* at 119.

329. Ezekiel J. Emanuel et al., *What Makes Clinical Research Ethical?*, 283 JAMA 2701, 2703 (2000).

330. *See* United States v. Arora, 860 F. Supp. 1091, 1099 (4th Cir. 1994).

331. *Id.*

332. Diamond v. Chakrabarty, 447 U.S. 303 (1980).

333. Pres. & Fellows of Harv. College v. Canada (Commissioner of Patents), [2000] D.L.R. 385.

334. *Id.* at 400.

335. *See generally Diamond*, 447 U.S. 303.

336. Jeremy Waldron drew a distinction between a 'concept' and a 'conception' of property. Waldron, *supra* note 189, at 340. Alienability was not part of the concept of property, and therefore, might not be recognized by a particular legal system's conception of property: "The *concept* of ownership is the very abstract idea described in section 5: a correlation between individual names and particular objects, such that the decision of the person whose name is on the object about what should be done with that object is taken as socially conclusive. The detailed rules of particular legal systems (whether real or imaginary) assigning rights, liberties, powers, immunities and liabilities to people in regard to particular resources amount to *conceptions* of that abstract concept. They indicate ways in which the abstract idea of ownership has been or may be realized concretely in particular societies." (italics in the original). *Id.*

whether a corpse or human tissue qualifies as property ought not to depend solely on its intrinsic monetary value or allied considerations, but on the social, economic and privacy considerations raised by biomedical technology. This raises the question of whether the court should articulate a full property interest in the human body.

IV. SUGGESTED ROUTES TO FINDING A PROPERTY INTEREST IN THE HUMAN BODY

It is possible for courts to find the existence of a property interest in a corpse or tissue by drawing analogies from various areas of law where similar rights are firmly established. Courts have found, in some instances, that property interests do exist in a corpse or in bodily materials such as cells.[337]

A. Autonomy and the Right to Bodily Self-Determination

When examining situations where courts have enforced a person's right to bodily self-determination, it is apparent that courts have indirectly enforced rights similar to property rights. It is well settled that an individual has authority over his or her body and the right to determine what is done to it.[338]

This principle of bodily self-determination is best exemplified in the context of the physician-patient relationship.[339] Except in the case of emergency or statutory authorization, medical intervention may only be undertaken with the consent of the patient; otherwise, the physician is liable for battery.[340] Even when consent is given, the physician has a duty to give the patient adequate information on all the potential and likely risks of medical intervention.[341] A breach of this duty may result in a claim for negligence or medical malpractice.[342]

The common law right of a patient to consent to treatment also includes a right to refuse or withdraw from medical treatment.[343] This right is now constitutionally protected.[344] Thus,

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337. *See generally* White, *supra* note 4.
338. Schleondorff v. N.Y. Hosp., 105 N.E.2d 92, 93 (N.Y. 1914).
339. *Id.*
340. *See id.*; Parmley v. Parmley, [1945] D.L.R. 81; Marshall v. Curry, [1933] D.L.R. 260.
341. Reibl v. Hughes, [1981] D.L.R. 1.
342. *Id.*
343. Ciarlariello v. Schacter, [1993] S.C.R. 119.

a patient may legally refuse life-saving treatment even when death is imminent.[345] Therefore, it may be argued that Canadian law permits a person to terminate his or her life by foregoing life-saving treatment. In other words, disease naturally causes the resultant death.[346] The patient has a choice to either be treated or abstain from treatment. The latter is a deliberate termination of life.

The current debate on the legality of euthanasia and assisted-suicide makes the foregoing analogy clearer.[347] In *R. v. Latimer*,[348] the Supreme Court of Canada affirmed the illegality of euthanasia.[349] For compassionate reasons, Robert Latimer killed his mentally and physically debilitated twelve-year-old daughter who suffered from cerebral palsy.[350] He was convicted of second-degree murder.[351] He unsuccessfully challenged the constitutionality of the Canadian Criminal Code as imposing an inhuman and degrading treatment.[352] U.S. law is similar,[353] though the state of Oregon allows assisted suicide for mentally

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344. Krischer v. McIver, 697 So. 2d 91, 102 (Fla. 1997); Cruzan v. Director, Mo. Dept. of Health, 110 S. Ct. 2841, 2842 (1990); Rodriguez v. A.G. of Canada, [1993] S.C.R. 519, 587–89.

345. Malette v. Shulman, [1990] O.R.2d 417, 424 (discussing where the patient was entitled to refuse a medically necessary blood transfusion, even though the refusal was based on her religious belief).

346. There is a fruitful judicial and juristic distinction of the difference between causation and intent or between refusal of treatment and assisted suicide. Amy L. Jerdee, *Breaking Through The Silence: Minnesota's Pregnancy Presumption And The Right To Refuse Medical Treatment*, 84 MINN. L. Rev. 971, 986 (2000); David Orentlicher, *The Alleged Distinction Euthanasia and the Withdrawal of Life-Sustaining Treatment: Conceptually Incoherent and Impossible to Maintain*, 3 U. ILL. L. Rev. 837 (1998); Trudo Lemmens, *Towards the Right to be Killed? Treatment Refusal, Assisted Suicide and Euthanasia in the United States and Canada*, 52 BRIT. MED. BULL. 341 (1996); Gilmore v. Finn, 527 S.E.2d 426, 434 (Va. 2000); Wash. v. Glucksberg, 117 S. Ct. 2258 (1997); Vaco v. Quill, 117 S. Ct. 2293 (1997); Nancy B. v. Hotel-Dieu de Quebe, [1992] C.C.C. 450.

347. For an overview of jurisdictional attitudes: Barney Sneiderman & Marja Verhoef, *Patient Autonomy And The Defense of Medical Necessity: Five Dutch Euthanasia Cases*, 34 ALTA. L. REV. 374 (1996); P. S. Florencio & R. H. Keller, *End-of-Life Decision Making: Rethinking the Principles of Fundamental Justice in the Context of Emerging Empirical Data*, 7 HEALTH L. J. 233 (1999).

348. R. v. Latimer, [2001] D.L.R. 577.

349. *Id.* at 585.

350. *Id.* at 579.

351. *Id.*

352. Barney Sneiderman, *The Case of Robert Latimer: A Commentary on Crime and Punishment*, 37 ALTA. L. REV. 1017 (1999) (criticizing the sentence at the Court of Appeals stage).

353. *Glucksberg*, 17 S. Ct. at 2258; Vaco v. Quill, 117 S. Ct. 2293 (1997).

incompetent persons who come within the terms of the law.[354] It is estimated that twenty-seven people died in 2000 under Oregon's Death With Dignity Act.[355]

Notwithstanding the prohibition on assisted-suicide and euthanasia, the law, by resorting to nuances, allows deliberate termination of life. For instance, if a physician prescribes a lethal overdose of medication, with the intent to alleviate unremitting pain, it is not murder, even though it results in death.[356] This is euphemistically called palliative care.[357] In some instances, a physician is allowed to place a do-not-resuscitate order for a patient in a persistent vegetative state when, in the physician's opinion, treatment becomes futile.[358]

The courts have maintained that a rational distinction exists between a refusal of life-saving treatment that may result in death, and assisted suicide.[359] It has been suggested that both are instances of semantic detoxification and masking the murderous intent.[360] The law has wittingly or unwittingly allowed the devaluation and objectification of human life.[361]

In *McFall v. Shimp*,[362] the plaintiff needed a bone marrow transplant to survive.[363] The defendant was the plaintiff's cousin

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354. Death With Dignity Act, ORE. REV. STAT. § 127.800 (1997) *available at* http://www.ohd.hr.state.or.us/chs/pas/pas.htm. A constitutional challenge of the statute, in *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997), failed for lack of standing. Daniel Avila, *Assisted Suicide and the Inalienable Right to Life*, 16 IL&M 111 (2000) (discussing potential public status injury inflicted on some people by the Act).

355. Peter Goodspeed, *Death on Demand*, NAT'L POST (Can.), Apr. 3, 2001 at A11.

356. James Goss, *A Postscript to the Trial of Dr. David Moor*, 2000 CRIM. L. REV. 568; Anthony Arlidge, *The Trial of Dr. David Moor*, 2000 CRIM. L. REV. 31; J. C. Smith, comment, *A Comment on Moor's Case*, 2000 CRIM. L. REV. 41; Alec Samuels, *The Doctor, the Patient, and Easing the Passing: The Law*, 68 MEDICO-LEGAL J. 38 (2000).

357. Goss, *supra* note 356, at 570.

358. Child & Family Services of Central Manitoba v. Lavallee, [1997] D.L.R. 409; Sawatzky v. Riverview Health Ctr., Inc., [1998] D.L.R. 358; Airedale Nat'l Health Serv. Trust v. Bland, 1 All E.R. 821 (1993); Barney Sneiderman, Comment, *A Do Not Resuscitate Order For An Infant Against Parental Wishes: A Comment on the Case of Child and Family Services of Central Manitoba v. R.L. and S.L.H.*, 7 HEALTH L. J. 205 (1999).

359. *See generally* Avila, *supra* note 354.

360. Adam J. Hildebrand, *Masked Intentions: The Masquerade of Killing Thoughts Used to Justify Dehydrating and Starving People in a "Persistent Vegetative State" and People with Other Profound Neurological Impairments*, 16 INT'L L. & MED. 143 (2000).

361. *See generally* Avila, *supra* note 354.

362. McFall v. Shimp. 10 Pa. D. & C.3d 90 (1978).

363. *Id.* at 90.

and refused to donate the matching bone marrow.[364] The plaintiff's action to compel the donation under a mandatory injunction failed.[365] The court implicitly recognized a type of property right in the defendant's bone marrow, in holding that the plaintiff's organs could not be harvested without his consent.[366] Similarly, in *R v. Stillman*,[367] the Supreme Court of Canada held that it was not permissible for the police to surreptitiously obtain a mucous sample of a detainee for DNA analysis.[368] As such, these cases enforced property-like protections. A full and conscious recognition of property rights in the human body may help balance the competing interests of the sanctity of life with the specter of commodification.

B. Transformation of a Corpse or Human Tissue by Work and Skill

Australian courts have crystallized an exception, first enunciated in 1908,[369] that an expenditure of labor on a corpse deserves property protection.[370] This seems to be a judicial recognition of John Locke's[371] and Stuart Mill's[372] theses, which state that products of a person's labor are property of that person.[373]

In *Doodeward v. Spence*,[374] which involved a right to the possession of a double-headed stillborn fetus, the High Court of Australia, observed:

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364. *Id.*

365. *Id.* at 92.

366. Guido Calabresi, *Do We Own Our Bodies?*, 1 HEALTH MATRIX 5 (1991) (commenting on cases with a presumption that there is a property right in one's body).

367. R. v. Stillman, [1997] S.C.R. 607.

368. *Id.* The majority reasoned that the mucous sample was not abandoned since it was obtained in the context of detention, and against the explicit prior refusal of the defendant to give bodily samples. *Id.* at 675. It was therefore conscripted evidence. *Id.* Nevertheless, the court held that the mucous sample was discoverable through an alternative non-conscriptive means, and was obtained with minimal breach of the appellants dignity. *Id.* On those grounds, the sample was therefore admissible. *Id.*

369. Doodeward v. Spence, [1908] C.L.R. 406 (referring approvingly to the following cases: Miner v. C.P.R., [1911] Alta L.R. 409, 413; Janicki v. Hosp. of St. Raphael, 744 A.2d 963, 968 (Conn. Super. Ct. 1999); Dobson v. N. Tyneside Health Auth., 1 W.L.R. 596, 600 (C.A. 1997); and R. v. Kelly, 3 All E.R. 741 (C.A. 1998)).

370. *Doodeward*, 6 C.L.R. at 406-07.

371. LOCKE, *supra* note 193, at 15.

372. MILL, *supra* note 199, at 172.

373. *See generally* LOCKE, *supra* note 193, at 17.

374. *Doodeward*, 6 C.L.R. at 406.

> I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.[375]

For the exception to apply, the initial possession of the dead body, or any part of it, must be lawful.[376] Also, such possession must not affront public health or decency.[377] Therefore, a researcher who breaks into a morgue to steal body parts and scientifically preserves them cannot claim the exception. In *R. v. Kelly*,[378] the British Court of Appeal held that an artist, who surreptitiously obtained body parts scientifically preserved at the Royal College of Surgeons, was guilty of theft.[379] Thus, the court envisaged future legal protection for body parts intended for transplantation or DNA analysis, even when these parts had not been subjected to the application of labor and skill.[380] It has been suggested that the *Doodeward* exception consumes the general no-property rule in dead bodies.[381]

With respect to living body parts, *Moore* presents a latent application of the work and skill exception. In *Moore*, the plaintiff's excised cell was transformed into a patentable and lucrative cell line by use of scientific skill and labor.[382] The court held that the patent belonged to the researchers, even though ownership of the patent was not at issue.[383] One could conclude that the investment of scientific labor on Moore's cell contributed to the dismissal of his cause of action for conversion.

C. Utility

Biomedical technology gives corpses and body parts a utility

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375. *Id.* at 414.
376. *Id.* at 406-07.
377. *Id.* at 413.
378. R. v. Kelly, 3 All E.R. 741 (C.A. 1998).
379. *See generally id.*
380. *Id.* at 750.
381. White, *supra* note 4, at 167.
382. *Id.* at 481-82.
383. *Id.* at 492.

that was not present when the no-property rule emerged. With the systematic regulation of anatomy by the British Anatomy Act of 1832,[384] cadavers became profoundly useful for medical training and anatomical examination.[385] This new use led to a shift in the attitude of British judges toward human corpses.[386] The observation of Judge Willes remains on point:

> [B]ut in modern times the requirements of science are larger than formerly, and when they are so extensive it seems to me that we ought not to entertain any prejudice against the obtaining of dead bodies for the laudable purpose of dissection, but we ought to look at the matter with a view to utility.[387]

Today, the utility of a corpse, or parts of it, has transcended those envisaged by Judge Willes. Body parts are currently being used in DNA analysis, artistic casts, researching predictive testing technique for genetic disorders and organ transplants. Thus, the progressive utility of the human body requires property protection.

D. Characterization Under Certain Statutes

When construing certain statutes, some courts have held that the human body is an object of property. While these statutes deal with special circumstances, they are not irrelevant. For example, in *Onyeanusi v. Pan Am*,[388] the Court of Appeals held the plaintiff's deceased mother qualified as "goods" under The Warsaw Convention.[389] Thus, the plaintiff's delay in giving the required statutory notice precluded him from recovering damages for the defendant's nine-day delay in delivering the corpse at the contracted destination.[390] Justice Cowen's observation sets forth the general principle of this case:

> Human remains can have significant commercial value, although they are not typically bought and sold like other goods. Medical schools and hospitals commonly use human cadavers for training and experiments. Human tissue and organs which are taken from the recently deceased have inestimable value in transplant operations. Although remains

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384. Anatomy Act, 1832, 2 & 3 Will. 4, c. 75 (Eng.).
385. *See* Matthews, *supra* note 9, at 214-15.
386. R. v. Feist, 169 Eng. Rep. 1132, 1135 (Cr. Cas. 1858).
387. *Id.*
388. Onyeanusi v. Pan Am, 952 F.2d 788 (3d Cir. 1992).
389. *Id.* at 792-93.
390. *Id.* at 793.

> which are used for these medical and scientific purposes are usually donated, rather than bought and sold, this does not negate their potential commercial value. Onyeanusi argues that many states prohibit commerce in human remains or organs. Notwithstanding the legality of selling some parts of the body, most notably blood and sperm, we believe these state laws against organ and tissue sales are premised on moral and ethical, rather than economic, considerations. In fact, the very existence of these state laws indicates that there would be a market for human remains in the absence of government intervention.[391]

As noted above, statutes like The Human Tissue Gift Act,[392] Human Organ Transplant Act[393] and Uniform Anatomical Gift Act,[394] though prohibiting sales in transplantable organs, implicitly recognize their property-like characteristics. Market transactions in regenerative body parts like blood,[395] hair, fingernails, toenails[396] and bone marrow are already well known, though in the case of blood it is sometimes regarded as "service" rather than sale.[397]

Anatomy legislation recognizes that a corpse is property capable of donation for anatomical examination.[398] Donations can be made by persons who have lawful possession of the corpse or by the deceased prior to his or her death.[399] The first case decided under the British Anatomy Act of 1832 confirmed this opinion.[400] In *R. v. Feist*,[401] the court observed that, "[t]he *Anatomy Act* has altered the common law, and has rendered the selling of a dead body for the purpose of dissection lawful under certain

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391. *Id.* at 792. *But cf.* Bourne v. Norwich Crematorium Ltd., 2 All E.R. 576, 578 (1967) (holding, however, that, "it would be a distortion of the English language to describe the living or the dead as goods or materials.").

392. Human Tissue Gift Act, R.S.O. ch. H-20 (1990) (Can.).

393. Human Organ Transplant Act, 1989, c. 31 (Eng.).

394. Uniform Anatomical Gift Act, 8A U.L.A. 19 (1987).

395. Perlmutter v. Beth David Hosp., 123 N.E.2d 792 (N.Y. 1954); Carter v. Inter-Faith Hosp. of Queens, 304 N.Y.S.2d 97 (App. Div. 1969).

396. Venner v. Maryland, 354 A.2d 483, 498 (Md. Ct. Spec. App. 1976) (holding that they are regarded as property).

397. *See* Rao, *supra* note 99, at 371-386.

398. *See* Nigeria's Anatomy Act, 1958, 2 & 3 Will. 4, c. 75, c. 11 (which is based on the English Anatomy Act of 1832).

399. *Id.*

400. R. v. Feist, 169 Eng. Rep. 1132, 1135 (Cr. Cas. 1858).

401. *See id.*

circumstances."[402] Society has tolerated, in various forms, ownership of the human body. Therefore, a full judicial recognition of the human body as a property interest may not be shocking.

E. Why Not Property in the Human Body?

The most formidable argument against the recognition of a full property right in the human body is the slippery slope argument that it would cause devaluation, objectification and commodification of life.[403] This argument also surfaces in the debate on the patenting of human genes.[404] Some fear that unconscionable scientists will prey upon vulnerable communities that possess unique genes.[405] A market for stem cells, harvested from fresh embryos, already exists and have been sold for as much as five thousand dollars.[406]

Recently, a newspaper reported that human tissues from a decommissioned anatomy lab at the University of Toronto were being sold at an antique auction.[407] Before condemning anything that smacks of commodification or objectification of life, note that a full property interest in the human body provides the surest safeguard against the concerns raised by advocates of a no-property regime.[408]

Some of the issues that arise are how to recover possession and damages from a person who opens a grave, takes the body, and refuses to deliver it.[409] Another issue is what remedies are available to an organ bank when useful human organs in its possession are willfully destroyed or stolen. Finally, the question arises of how a researcher may recover possession of human cells,

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402. *Id.* at 1135.

403. B. Williams, *Concepts of Personhood and the Commodification of the Body*, 7 HEALTH L. REV. 11 (1998-1999).

404. E. Richard Gold, *Patents in Genes, Prepared for the Canadian Biotechnology Advisory Committee Project Steering Committee on Intellectual Property and the Patenting of Higher Life Forms*, (Dec. 2000), *available at* http://www.cbac-cccb.ca.

405. *Id.* at 13, 17-18.

406. Margaret Munro, *A Vision of Spare Parts*, NAT'L POST (Can.), Mar. 29, 2001, at A15; Brad Evenson, *Door Opened To Research With Embryos*, NAT'L POST (Can.), Mar. 30, 2001, at A4.

407. Heather Sokoloff, *Human Tissue on Sale at Auction*, NAT'L POST (Can.), Apr. 16, 2001, at A4.

408. Skegg, *supra* note 31, at 229.

409. Keyes v. Konkel, 78 N.W. 649 (Mich. 1899) (holding that right to recover possession of a corpse was denied).

lawfully acquired and used in a socially useful activity, from a thief who has stolen them.[410] Similarly, the court in *Ritter v. Couch*[411] asked:

> The world does not contain a tribunal that would punish a son who should resist, even to death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body?[412]

This statement suggests that the best approach is to recognize a full right of property in the human body and its parts. The state can enact statutes, similar to those relating to organ transplants, to deal with specific cases of abuse in property rights, like the sordid market in body parts existing in developing countries.[413] The state's position on the human body will not differ from the law's treatment of other items of property because property rights have always been subject to state interest. Thus, the right to use one's property as one sees fit does not entitle one to cause a nuisance. In contrast, the current situation perpetuates injustices.

Recognizing the human body as property may pave the way for constitutional protection. Such protection was attempted in *Crocker v. Pleasant*,[414] where plaintiffs claimed that the defendant's interment of their son, without sufficient notice to them, was a breach of property under the Fourteenth Amendment of the U.S. Constitution.[415] The claim failed and the court did not recognize any property interest in a dead body.[416] It appears that the benefits of allowing a full property right in the human body outweigh the disadvantages.

V. CONCLUSION

Recent advances in biomedical technology have intensified the question of property rights in a human body or corpse. Recent judicial and scholarly opinions tend to support the existence of property interests in human body tissue or corpses. The dominant

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410. United States v. Arora, 860 F. Supp. 1091 (4th Cir. 1994) (holding that a cultured human cell was property).
411. Ritter v. Couch, 76 S.E. 428 (W. Va. 1912).
412. *Id.* at 430.
413. *See* Matthews, *supra* note 9.
414. Crocker v. Pleasant, 717 So. 2d 1087 (Fla. 1999).
415. *Id.* at 1088.
416. *Id.* at 1089.

paradigms of property rights do not, however, accommodate the existence of property interests in the human body. Recognition of such interests has become imperative due to enormous advances in science and technology. The courts, in addition to methods already in use, should find a property interest in a human body by drawing analogies from areas of law that affirm property rights in the human body. Enacting statutes can alleviate commodification or objectification of the human body.